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7  
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9 UNITED STATES BANKRUPTCY COURT  
 10 DISTRICT OF ARIZONA

11 In re:	)	Chapter 11
	)	
12 BCE WEST, L.P., ET AL.,	)	CASE NOS. 98-12547 through 98-
	)	12570 PHX - CGC
13 Debtor(s).	)	
	)	Chapter 11
	)	
	)	LIMITED OBJECTION OF THE
	)	MACERICH COMPANY TO MOTION TO
	)	REJECT UNEXPIRED LEASES OF NON-
	)	RESIDENTIAL REAL PROPERTY
	)	
17		Hearing Date: Oct. 26, 1998
18		Hearing Time: 10:00 a.m.

19 The Macerich Company, as managing agent for Chesterfield  
 20 Mall (the "Landlord"), by and through its attorneys, hereby  
 21 objects to the motion filed by BCE West, L.P., et al. (the  
 22 "Debtor(s)") to reject unexpired leases of non-residential real  
 23 property (the "Motion") to the extent it seeks to have the  
 24 rejections effective prior to the entry of the rejection order.  
 25 The Motion requests that the order approving the rejection of the  
 26 leases have an effective date on the earlier of (i) the date the  
 27 respective debtor vacated the leased premises or (ii) the date of  
 28 the Order. Any order granting rejection prior to the date the

1 rejection order is entered will reduce the Landlord's valid  
2 administrative claim for postpetition rent and violate section  
3 365 of title 11 of the United States Code (the "Bankruptcy  
4 Code"). In support of this Objection, Landlord respectfully  
5 represents:

6 I.

7 STATEMENT OF FACTS

8 1. The Debtor filed a voluntary petition for relief under  
9 Chapter 11 of the Bankruptcy Code on or about October 5, 1998  
10 (the "Petition Date").

11 2. The Debtor previously entered into a written lease (the  
12 "Lease") with Landlord for the non-residential real property  
13 identified above and made a part hereof. A copy of the Lease  
14 will be provided upon request.

15 3. On or about October 8, 1998, Debtor filed a notice of  
16 the Motion for order which reflected a hearing date of  
17 October 26, 1998 wherein the Debtor requested authority to reject  
18 the leases of certain retail locations. The Lease is included  
19 among the leases the Debtor wishes to reject.

20 4. The Motion requests that the Court enter an order  
21 rejecting the Lease that is effective as of October 6, 1998, the  
22 date that the Debtor allegedly vacated the premises and  
23 purportedly delivered possession to the Landlord. However, an  
24 October 6, 1998 effective date would violate section 365 of the  
25 Bankruptcy Code and its underlying policies by allowing the  
26 Debtor to avoid the payment of a valid administrative claim  
27 consisting of rental charges to Landlord that accrued from  
28 October 5, 1998 to the date of the entry of the requested order.

5. Section 365(d)(3) of the Bankruptcy Code states that the "trustee shall timely perform all obligations of the debtor ... arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is rejected, notwithstanding section 503(b)(1) of this title."

11 U.S.C. § 365(d)(3) (emphasis added).

II.

NOTWITHSTANDING DEBTORS' UNILATERAL ACT OF VACATING THE PREMISES, REJECTION IS NOT EFFECTIVE UNTIL THE COURT APPROVES THE REJECTION

6. The overwhelming majority of courts interpreting section 365(d)(3) have held that court approval is a condition precedent to the rejection of a lease. See, e.g., In re Florida Lifestyle Apparel, Inc., 221 B.R. 897, 899 (Bankr. M.D. Fla. 1997); Maroon v. Four Star Pizza, Inc. (In re Four Star Pizza, Inc.), 135 B.R. 498, 501 (Bankr. W.D. Pa. 1992); WB, Ltd. v. Tobago Bay Trading Co. (In re Tobago Trading Co.), 142 B.R. 528, 532 (Bankr. N.D. Ga. 1991); In re Worths Stores Corp., 130 B.R. 531, 533 (Bankr. E.D. Mo. 1991); In re Virginia Packaging Supply Co., Inc., 122 B.R. 491, 493 (Bankr. E.D. Va. 1990); In re Garfinckels, Inc., 118 B.R. 154, 154 (Bankr. D.C. 1990); In re REVCO D.S., Inc., 109 B.R. 264, 267-69 (Bankr. N.D. Ohio 1989); In re National Oil Co., 80 B.R. 525, 526-27 (Bankr. D. Colo. 1987). According to these cases, the "plain, unequivocal language of section 365(a) indicates that court approval is required before a lease can be rejected."

7. As the Court stated in In re Treat Fitness Center, Inc.  
60 B.R. 878 (9th Cir. BAP 1986):

"To not follow these rather explicit rules [6006(a) and 9014] would be to lead us back into the

1 morass of attempting to judge the meaning and import of  
2 the conduct and conversations of the parties." Id. at  
3 879.

4 After quoting with approval the foregoing passage from Treat  
5 Fitness, the court in In Re National Oil Co., 80 B.R. 525  
6 (Bankr.D.Colo. 1987) went on to note:

7 The Debtor contends that compliance with these  
8 formalities requiring court approval to reject leases  
9 is an unreasonable burden. This Court rejects the  
10 contention that compliance with the explicit language  
11 of the law is unnecessary. Section 365 and the  
12 accompanying Bankruptcy Rules are designed to provide a  
13 degree of factual certainty in determining the actual  
14 date of rejection. Moreover the requirements for notice  
15 and opportunity for a hearing under Bankruptcy Rule  
16 9014 provide the creditor and the court with an  
17 opportunity to examine the efficacy of a debtor's  
18 decision to reject a lease under the business judgment  
19 test. It may be, on certain occasions, that a debtor's  
20 decision to reject an unexpired lease would not be in  
21 the best interests of the estate or the creditors, and  
22 the requirements of court approval operates as a  
23 safeguard to protect against a unilateral decision by  
24 the debtor that could be prejudicial to the creditors  
25 [Citations omitted.] [Emphasis added.]

26 The fact that physical control of the premises may have been  
27 returned to Landlord by the Debtor's return of the keys does not  
28 give Landlord control to do as it sees fit with the property.  
Landlord is still required to wait until the court's order  
granting rejection before exercising the actual control over the  
property.

8. In the recent case of In Re Surf City Squeeze, Inc.,  
currently pending in the District of Arizona, the debtors made  
similar arguments to those set forth by the Debtor in this case.  
After the submission of briefs by the parties in interest, as  
well as oral argument, Judge Nielsen issued a detailed bench  
opinion setting forth the reasons for denying the debtor's  
request that the rejection date as well as the duty to pay post-

1 petition rentals should pre-date the court's entry of the order  
2 approving rejection of the leases. (See Exhibit "A" attached  
3 hereto.) In a well reasoned opinion, Judge Nielsen not only held  
4 that the majority of decisions on the rejection date being the  
5 date the court enters its order are the appropriate  
6 interpretation of the statute (Section 365(a)), but also went on  
7 to explain why under the current law in the Ninth Circuit it  
8 would be inappropriate to allow a retroactive rejection with the  
9 concomitant cessation of rental payment as of that earlier date.  
10 In this regard, Judge Nielsen found that the possible equitable  
11 considerations referenced in In Re Thinking Machines, 67 F.3d  
12 1021 (1st Cir. 1995) simply did not coincide with the Ninth  
13 Circuit's interpretation of Section 365. By analyzing the impact  
14 of the Ninth Circuit's decision in In Re Pacific Atlantic Trading  
15 Company, 27 F.3d 401 (1996), Judge Nielsen found that "§365(d)(3)  
16 plainly requires payment of full rent because a rejection is not  
17 effective until the Court enters the Order." Judge Nielsen found  
18 that Pacific Atlantic as well as other Ninth Circuit precedent  
19 compelled a finding that the Ninth Circuit "would look askance at  
20 the equitable notions advanced by the debtor...".

21 III.

22 DEBTORS CONTINUE TO REMAIN LIABLE FOR ADMINISTRATIVE  
23 RENT UNTIL THE DATE A REJECTION ORDER IS ENTERED.

24 9. In their Motion, the Debtors ask this Court to deny  
25 Landlord its valid administrative claim for rental charges which  
26 accrue between October 6, 1998 and the date the order authorizing  
27 rejection of the Lease is entered. Section 365(d)(3) of the  
28 Bankruptcy Code states that a trustee (or debtor-in-possession,

1 pursuant to section 1107 and 1108 of the Bankruptcy Code) must  
2 timely perform all lease obligations of the debtor arising from  
3 the petition date until the lease is rejected, notwithstanding  
4 section 503(b)(1) of the Bankruptcy Code. The overwhelming  
5 majority of courts hold that the phrase "notwithstanding section  
6 503(b)(1) of this title" means that rent for the period from the  
7 petition date until rejection of a lease are allowable as  
8 administrative expenses without the need for prior notice and  
9 hearing otherwise required for expenses to be afforded  
10 administrative claim status under section 503(b)(1) of the  
11 Bankruptcy Code. See, e.g., Tobago Bay Trading Co., 142 B.R. at  
12 533; In re Cardian Mortgage Corp., 127 B.R. 14, 21 (Bankr. E.D.  
13 Va. 1991); In re Wingspread Corp., 116 B.R. 915 (Bankr. S.D.N.Y.  
14 1990), aff'd, Pandora Indus., Inc. v. Paramount Comm., Inc. (In  
15 re Wingspread Corp.), 145 B.R. 784 (S.D.N.Y. 1992); In re  
16 Cardinal Indus., Inc., 109 B.R. 738, 740 (Bankr. S.D. Ohio 1989);  
17 In re Granada, Inc., 88 B.R. 369, 371-72 (Bankr. D. Utah 1988);  
18 In re Dieckhaus Stationers of King of Prussia, Inc., 73 B.R. 969,  
19 971-72 (Bankr. E.D. Pa. 1987); In re Longua, 58 B.R. 503, 504-05  
20 (Bankr. W.D. Wis. 1986).

21 10. On the date a motion to reject a lease is filed, there  
22 is absolutely no certainty that the motion will be granted.  
23 Indeed, until an order rejecting the lease has been entered by  
24 the court, a commercial landlord is obligated to provide a usable  
25 premises to the debtor and must incur expenses such as utility  
26 and security charges. Therefore, courts have recognized that  
27 section 365(d)(3) was included in the Bankruptcy Code to provide  
28 administrative claim status to commercial landlords, even though

1 the lease may no longer be necessary or beneficial to the  
2 debtor's estate, because commercial landlords remain obligated to  
3 Debtors until the day an order authorizing rejection has been  
4 entered. See, e.g., In re Worths Stores Corp., 135 B.R. 112,  
5 114-15 (Bankr. E.D. Mo. 1991); In re M.H.I., Inc., 61 B.R. 69-70  
6 (Bankr.D.Md. 1986) and In re Slim Life Weight Loss Centers Corp.,  
7 et al., 182 B.R. 701, 704 (Bankr. D.N.J. 1995).

8 11. This case does not justify a retroactive effective date  
9 of rejection of October 6, 1998. Landlord should not be denied  
10 an administrative claim for rental charges up to the date of  
11 entry of an order rejecting its lease. Until the Court order  
12 approving the rejection is entered, Landlord continues to be  
13 subject to further orders of the Court and unable to exercise  
14 control over its premises. For example, if the case was  
15 converted to one under Chapter 7 of the Bankruptcy Code between  
16 the filing of the motion and the hearing on the motion, Landlord  
17 would be subject to the commencement of a new sixty day period  
18 for the assumption or rejection of a lease and the possible  
19 decision by a trustee to keep and maintain the property. Debtor  
20 would have the court deny Landlord the right to control the  
21 property until entry of the rejection order, while at the same  
22 time denying Landlord compensation for its property.

23 12. Given that Landlord's property is tied up until the  
24 entry of a rejection order, it is only fair that Landlord receive  
25 full administrative compensation for the use of its property  
26 during this period. This is true, even if the Debtor has vacated  
27 the premises prior to the filing of the motion.

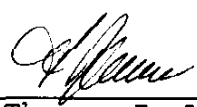
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1           13. Pursuant to Section 365(d)(3) of the Bankruptcy Code,  
2 Landlord holds a valid administrative claim for the Debtor's  
3 occupancy from the Petition Date until the date this Court enters  
4 an order approving the rejection of the Lease. The Court should  
5 not defeat Landlord's claim by entering the order retroactive to  
6 October 6, 1998.

7           14. Landlord therefore respectfully requests that this  
8 Court: (a) deny the Debtor's Motion to the extent it requests an  
9 effective date of the rejection of the Lease that is prior to the  
10 date an order rejecting the Lease is entered by this Court; (b)  
11 deem the effective date of the rejection of the Lease to be the  
12 date the order authorizing the rejection of the Lease is entered;  
13 and (c) direct and order the Debtor to immediately pay to  
14 Landlord, as administrative expenses, rent accrued under the  
15 Lease from the Petition Date through the date the order approving  
16 rejection is entered.

17  
18 Dated: October 19, 1998

KATTEN MUCHIN & ZAVIS  
Thomas J. Leanse  
Cheryl L. Van Steenwyk

19  
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21 By:   
22 Thomas J. Leanse  
23 Attorneys for The Macerich  
24 Company  
25  
26  
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28



ORIGINAL

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF ARIZONA

In Re.

SURF CITY SQUEEZE, INC.

CH. 11

97-00451-PHX-GBN

ORAL ARGUMENT ON THE LEGAL QUESTION WHEN  
THE REJECTION IS DEEMED EFFECTIVE

U.S. Bankruptcy Court  
2929 N. Central Ave., 9th Floor  
Phoenix, Arizona 85012

April 9, 1997  
9:04 a.m.

BEFORE THE HONORABLE GEORGE B. NIELSEN, JR., Judge  
(Designation of Record)

APPEARANCES:

For the Debtor:

Samantha G. Masters-Brown  
STREICH LANG  
Two N. Central Avenue  
Phoenix, AZ 85004-2391

For Official Committee  
of Unsecured Creditors:

Charles R. Sterbach  
GALLAGHER & KENNEDY  
2600 N. Central  
Phoenix, AZ 85004-3020

For MaceRich Company,  
Westfield Corporation,  
Inc.:

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For Kravco Company,  
New Plan Realty Trust,  
General Growth  
Management, The  
Equitable Life  
Assurance Society of  
the U.S.:

David L. Pollack  
POLLACK, MEYERS & ROSENBLUM  
37th Floor Bell Atlantic Tower  
1717 Arch Street  
Philadelphia, PA 19103-2793

1 APPEARANCES: (Continued)

2 For Kravco Company,  
3 New Plan Realty Trust,  
4 General Growth  
5 Management, and The  
6 Equitable Life  
7 Assurance Society of  
8 the U.S.:

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Phoenix, AZ 85012

6 For Simon Debartolo  
7 Group, Century III  
8 Associates,  
9 Knickerbocker  
10 Properties:

Ronald M. Tucker  
Attorney at Law  
115 W. Washington Street  
Indianapolis, IN 46204

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25 Proceedings recorded by electronic sound technician, Jo-Ann  
Stawarski; transcript produced by A/V Tronics, Inc.

1 THE COURT: Lady and gentlemen, I'll make a ruling  
2 now in connection with this difficult matter. I'll make my  
3 ruling part of the records of this case by announcing it  
4 orally at this time. Any interested party who wishes a  
5 complete copy of my ruling, my reasons therefore, may obtain  
6 it by contracting with the court technician obtaining thereby  
7 either a tape or transcript of this hearing.

8 And this has been oral argument on a legal question  
9 arising in a Chapter 11 business reorganization case, the  
10 question being when the rejection date of certain commercial  
11 leases is to be deemed effective.

12 A debtor, subject to the Court's approval, may  
13 assume or reject executory contracts and unexpired leases.  
14 Where the debtor is a lessee under an unexpired lease of  
15 nonresidential real property, the debtor has 60 days to  
16 decide whether to assume or reject. During that period, the  
17 debtor must continue to perform all of the obligations of the  
18 debtor under the lease. That's the rule of the Ninth Circuit  
19 in In re Pacific Atlantic Trading Company, 27 F.3d 401 at  
20 403.

21 Notwithstanding this general analysis of § 365(a)  
22 and 365(d)(3), the question is does the Court have the  
23 authority to make a rejection retroactive to the date the  
24 rejection motion was filed. While the Ninth Circuit has not  
25 squarely addressed this issue, the First Circuit certainly

1 has. That case is In re Thinking Machines Corporation, 67  
2 F.3d 1021.

3 The First Circuit summarized as follows:

4 "Here the protagonists assure us the  
5 statutory language is plain. We need not  
6 go beyond it. Debtor says rejection of a  
7 nonresidential lease plainly becomes  
8 effective on the motion filing date  
9 subject to defeasance in the event a  
10 judge vetoes the decision."

11 The landlord said the rejection plainly cannot become  
12 effective until the court approval date. See 67 F.3d at 1025.

13 The Court noted authorities are divided on the  
14 question. The minority view is that § 365 should be read to  
15 align judicial approval as a condition subsequent to the  
16 independently effective rejection of a non-residential lease.  
17 The majority view reads 365(a) to require judicial approval  
18 as a condition precedent to an effective rejection.

19 While noting that § 365(a) was ambiguous as to  
20 whether approval constitutes a condition precedent or  
21 subsequent to rejection, the First Circuit held § 365(a) is  
22 most faithfully read as making court approval a condition  
23 precedent to effectiveness of rejection. Therefore, the date  
24 of court approval, not the motion filing date, controls.

25 The court cited four reasons for adopting the

1 majority view. I don't think it's necessary to go into those  
2 reasons. Given the above reasons, the court adopted the  
3 majority view, however, and this is the language that helps  
4 set the stage for this present dispute. The court went on to  
5 state that nothing precludes a bankruptcy court in an  
6 appropriate § 365(a) case from approving a rejection of a  
7 non-residential lease retroactive to the motion filing date.  
8 See the First Circuit opinion at page 1028.

9           The court noted that bankruptcy courts are courts  
10 of equity and may sometimes abandon mechanical solutions in  
11 favor or fairness. In the § 365 context this means  
12 bankruptcy courts may enter retroactive orders of approval  
13 and may do so when the balance of equities predominates in  
14 favor of such remediation.

15           In a footnote the court found a retroactive  
16 approval order would not violate § 365(d)(3) which commands  
17 debtor to pay rent at the contract rate until a  
18 non-residential lease is rejected because it does not  
19 stipulate that a rejection cannot be made to apply  
20 retroactively. See 67 F.3d at page 1028, footnote 3.

21           The First Circuit did note that equitable powers  
22 are not unlimited. See page 1028. Thus, a bankruptcy  
23 court's exercise of its residual equitable powers must be  
24 connected to and advance the purposes of the specific  
25 provisions in the code. There is little question, however,

1 that a retroactive order may be appropriate as long as it  
2 promotes the purpose of § 365(a).

3 I believe I should adopt the majority view that  
4 rejection is not effective until approved by the court. See  
5 In re 1 Potato 2, Incorporated, 182 B.R. 540 at 541. But I  
6 believe that I'm required by the orientation of the Ninth  
7 Circuit to resist the notion that a rejection date can be  
8 applied retroactively as the First Circuit advances.

9 First of all, as noted by the Ninth Circuit  
10 Bankruptcy Appellate Panel, it is true that bankruptcy courts  
11 sit as courts of equity. However, a fundamental principal of  
12 equity jurisprudence is that equity follows the law. Court  
13 of equity are bound to follow express statutory commands to  
14 the same extent as are courts of law. Bankruptcy courts are  
15 no more entitled to ignore the law than are other courts.  
16 See the BAP's decision in Hoffman Brothers, 173 B.R. 177 at  
17 186 citing an earlier Ninth Circuit case In re Shoreline  
18 Concrete, 831 F.2d 903 at 905.

19 In the present case while the First Circuit  
20 minimizes the impact of 365(d)(3) by holding that subsection  
21 (d)(3) does not stipulate that a rejection cannot be made to  
22 apply retroactively, see footnote three, I believe that the  
23 fact remains § 365(d)(3) compels the debtor, at least in this  
24 circuit, to perform all these obligations prior to assumption  
25 or rejection. It would seem a retroactive rejection order

1 would necessarily violate 365(d)(3) since under the majority  
2 view the rejection order is a condition precedent to  
3 rejection, and as such, absent that order, if the debtor is  
4 required to comply with § 365(d)(3).

5 The Ninth Circuit has certainly endorsed this  
6 position. In Pacific Atlantic an involuntary petition was  
7 filed. At about that time the debtor ceased to conduct  
8 business and was in arrears in a one-month's rental payment,  
9 and totally in arrears on payments for subsequent months. By  
10 the time the petition was filed the debtor owed over \$145,000  
11 in unpaid rent. See 27 F.3d at page 402.

12 After the order for relief was entered on October  
13 31st of 1988, a trustee was appointed. The trustee had a  
14 conversation with the sublessor. The sublessor expected the  
15 estate to pay rent. The trustee made no payments. Trustee's  
16 counsel informed the sublessor that the sublessor was under a  
17 misapprehension in believing the trustee was bound by the  
18 sublease or that the sublessor was entitled to administrative  
19 rent.

20 Trustee indicated to his attorney that he did not  
21 intend to assume the lease, that the estate was not subject  
22 to the lease and the estate was liable only to the extent it  
23 used the premises; trustee was not using the premises in that  
24 case, was promptly removing certain odds and ends from the  
25 premises and the sublessor should do what it needed to to

1 lease the premises. Nonetheless, the sublessor filed an  
2 administrative claim for rent at the contract rate during the  
3 60 day pre-rejection period.

4 The court squarely ruled that the trustee's failure  
5 to pay the full amount of the debtor's rent obligation under  
6 a non-residential real estate lease for the period following  
7 bankruptcy but prior to rejection under 365(d)(4) gave rise  
8 to an administrative claim for the full amount regardless of  
9 the actual value conferred by the lease upon the estate.

10 As noted by our circuit, the trustee was required  
11 by § 365(d)(3) to make a lease payment prior to the end of  
12 the 60-day period pending assumption or rejection. Moreover,  
13 the circuit found that prior to the 1984 amendments the  
14 trustee did not have to timely perform. Lessors were  
15 entitled to an administrative priority for occupancy but only  
16 to the extent equal to the reasonable value of the debtor's  
17 actual use and occupancy. See 27 F.3d at 403.

18 The court stated legislative history indicates the  
19 statute was enacted to ameliorate the immediate financial  
20 burden borne by lessors during the period in which trustees  
21 decided whether to assume. The problem is that during the  
22 time debtor has vacated space but not yet decided to assume  
23 or reject. The trustee has stopped making payments. In this  
24 situation the landlord is forced to provide current services.  
25 No other creditor is put in this position.



1           The court discussed an earlier Bankruptcy Appellate  
2 Panel decision, Orvco, where the panel diverged from these  
3 authorities in the words of the Ninth Circuit. See 27 F.3d  
4 at 404. The Bankruptcy Appellate Panel concluded that where  
5 a lease of non-residential real property is deemed rejected  
6 and the trustee is not paid rent prior to rejection, a lessor  
7 must nonetheless establish its claim under § 503(b)(1)(A).

8 The court rejected this analysis stating:

9           "The plain unconditional language of the  
10 statute demands that a trustee promptly  
11 pay the full amount of rent due under a  
12 non-residential real property lease  
13 during the 60-day period pending  
14 assumption or rejection."

15 Under Orvco a trustee can evade this responsibility merely by  
16 refusing to pay the rent prior to rejection. All the while  
17 the lessor would be forced to provide current services at its  
18 own expense. This is wholly inconsistent with the mandate of  
19 § 365(d)(3). See page 404 of 27 F.3d.

20           In the present case the debtor's primary argument  
21 is that it abandoned -- not abandoned in the bankruptcy term  
22 but abandoned the leases pre-petition. There's some dispute  
23 of fact on this that was presented from the landlords at oral  
24 argument. But assuming the debtor is correct, does this  
25 abandonment mean the lease was no longer unexpired when the

1 debtor filed bankruptcy?

2 Even if the debtor turns in the keys, and there's  
3 again some factual controversy there, but where a debtor  
4 turns in the keys, abandons the premises and immediately  
5 files a motion to reject, can a debtor thereby be excused  
6 from the requirements of § 365(d)(3) by asking that the lease  
7 be deemed rejected on the date the motion was filed.

8 Even if the landlord is on notice the debtor has  
9 abandoned the property, has turned in the keys and has filed  
10 a motion to reject, § 365(a) requires court approval. §  
11 365(d)(3) plainly requires payment of full rent because a  
12 rejection is not effective until the court enters the order.  
13 The landlord would probably be advised by its bankruptcy  
14 counsel that it could not safely rent the property until that  
15 rejection order was entered. Yet under the equitable notions  
16 espoused by the learned First Circuit, the court might be  
17 able to retroactively apply a rejection effectively undoing  
18 the protections afforded by § 365(d)(3) to creditors who are  
19 still forced to provide current services while being unable  
20 to rent the premises.

21 While the Ninth Circuit did not specifically  
22 address this issue in Pacific Atlantic, the court did note  
23 that rent accrued prior to rejection regardless of the actual  
24 value conferred by the lease upon the estate was an  
25 administrative claim. See page 401 of the opinion. This

1 implies that the Ninth Circuit would look askance at the  
2 equitable notions advanced by the debtor and the committee  
3 and endorses a minority position by certain courts.

4 That's why I'm going to reject that position. I do  
5 not believe I have that rejection power. Well represented  
6 debtors, as this debtor is well represented, can craft other  
7 alternatives, and some suggestions were even made to  
8 ameliorate any harmful effects caused by the administrative  
9 claim that accrues; that would include setting hearings on  
10 extremely short notice, possibly even obtain, in appropriate  
11 cases, seeking to have a rejection order entered ex parte but  
12 expressly subject to reconsideration. There's various  
13 techniques that could be utilized here to minimize the  
14 administrative claim in these circumstances, but I do not  
15 believe a power to deem something retroactive is among those  
16 techniques.

17 That's why I'll find against the debtor. I'll deny  
18 the debtor's motion and require and find that the  
19 administrative claim does accrue until the rejection order is  
20 entered.


21 That will be my decision in this matter. Anything  
22 else to discuss while we're together?

23 We'll be adjourned in this case then. I'm going to  
24 leave the line, gentlemen.  
25

1 (Proceedings Concluded)

2  
3  
4 I certify that the foregoing is a correct  
5 transcript from the record of proceedings in the  
6 above-entitled matter.

7  
8  
9 April 11, 1997

  
A/V Tronics  
2715 N. Third Street, Ste. 207  
Phoenix, Arizona 85004

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PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is Katten Muchin & Zavis, 1999 Avenue of the Stars, Suite 1400, Los Angeles, California 90067.

On October 19, I served the foregoing document described as **LIMITED OBJECTION OF THE MACERICH COMPANY TO MOTION TO REJECT UNEXPIRED LEASES OF NON-RESIDENTIAL REAL PROPERTY** on the interested parties in this action by placing a true and correct copy of this document thereof, enclosed in a sealed envelope, addressed as follows:

**SEE ATTACHED SERVICE LIST**

( ) (BY MAIL) I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

(XX) BY OVERNIGHT COURIER. I caused said document(s) to be delivered via an overnight courier (**Federal Express**) to the above addressee(s).

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on October 19, 1998 at Los Angeles, California.

Cora Sagara  
Cora Sagara

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IN RE: BCE WEST, L.P., ET AL.

SERVICE LIST

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